

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-2718
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8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

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11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 16-2010

12
13 FEDERATION OF BUTTE-SILVER BOW)
14 EMPLOYEES, LOCAL 4372, MEA-MFT,)
15 AFT, AFL-CIO,)
16 Complainant,)
17 -vs-)
18)
19 CITY AND COUNTY OF BUTTE- SILVER)
20 BOW,)
21 Defendant,
22

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

23
24 **I. Introduction**

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26 On December 21, 2009, the Federation of Butte-Silver Bow Employees, Local 4372,
27 MEA-MFT, AFT, AFL-CIO, hereinafter Local 4372 or Union, filed an unfair labor practice
28 charge with the Board of Personnel Appeals alleging that the City and County of Butte-
29 Silver Bow, hereinafter BSB, committed an unfair labor practice when it unilaterally
30 changed the hours of work of a bargaining unit member without bargaining. No specific
31 statute was cited in the complaint as having been violated. BSB has responded to the
32 charge through Lindsey Ide, Human Resource Manager and has denied that BSB
33 committed an unfair practice. Local 4372 has provided information to the investigator
34 through its President, Debbie Alt, as well as through JC Weingartner, MEA-MFT
35 Director of Member Rights.
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38 John Andrew was assigned by the Board to investigate the charge and has reviewed
39 the information submitted by the parties and communicated with them as necessary in
40 the course of the investigation. The last information received by the investigator was
41 furnished by Ms. Alt on January 22, 2010.
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44 **II. Findings and Discussion**

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46 The facts of this case are fairly straightforward. Local 4372 is the clerical support unit
47 for BSB. Debbie Alt, is the current President of Local 4372 and has been, and currently
48 is, a member of the Union negotiating team. Ms. Alt is employed in the Finance and
49 Budget Department of BSB.
50

1 When she began working in the Finance Department in 1997 Ms. Alt worked a
2 traditional schedule of 8-5, five days per week. In May of 2007, Ms. Alt approached her
3 supervisor, Jeff Amerman, Finance and Budget Director, with a request that she be
4 allowed to work a four day schedule, ten hours each day. Mr. Amerman approved this
5 change, without any bargaining with the Union, and Ms. Alt began working the 4/10
6 schedule. Ms. Alt was the only person in the department who was working a 4/10
7 schedule. She worked under this schedule until July of 2009 at which time Mr.
8 Amerman placed Ms. Alt back on the traditional 8-5, five day per week schedule. This
9 change occurred without bargaining and was viewed by BSB as a management right
10 exercised in conformance with the collective bargaining agreement.
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13 BSB provided a rationale for why they changed Ms. Alt's schedule including a belief that
14 as things were, there were inefficiencies in the department and a certain degree of a
15 lack of accountability in the department. Ms. Alt disputes some, if not all of the
16 assertions made by BSB in this regard, but suffice to say, there were issues in the
17 department prompting the change that BSB deemed necessary and within their right to
18 exercise.
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21 The schedule change is captured in written form in a June 18, 2009, e-mail from Jeff
22 Amerman to JC Weingartner. That e-mail contains the department work rules being
23 adopted by BSB as well as a notice that the rules, and by reference, Ms. Alt's return to
24 an 8-5 schedule, would be effective July 1, 2009. On June 19, 2009, Mr. Weingartner
25 responded to Mr. Amerman by e-mail, copied to Ms. Alt, and Nancy Hogart, another
26 officer in Local 4372 advising:
27

28 Please be advised that these rules change conditions and terms of employment
29 and therefore are a subject of mandatory bargaining. The union demands to
30 bargain these changes. Please arrange a time with Debbie when you can meet
31 with the bargaining team to negotiate these proposed changes.
32

33
34 Please be advised that if you do implement these changes on July 1, 2009
35 without bargaining, an Unfair Labor Practice will be filed immediately.
36

37 A charge was not filed immediately, but it was filed on December 21, 2009. BSB did not
38 respond to the bargaining demand of the Union, other than to advise the investigator
39 that in the view of BSB there was no need to respond as the appropriate section of the
40 bargaining agreement was cited by BSB and given their interpretation of the agreement
41 there was no requirement to bargain.
42

43 Throughout this investigation BSB has denied it committed an unfair labor practice as it
44 followed the collective bargaining agreement and that, if anything, a grievance, not an
45 unfair labor practice should have been filed. At this point in time BSB contends that
46 such a grievance, if it were now filed, would be barred by timeliness under the
47 bargaining agreement. Citing the bargaining agreement, BSB contends that it relied on
48 Article 11, Sections 1 and 3 to support its belief there was no obligation to bargain. BSB
49 also contends that bargaining history, or rather lack of bargaining further supports its
50

1 position. Specifically BSB points to the fact that Ms. Alt's schedule was initially
2 changed without bargaining so there is no need to bargain another change back to the
3 traditional and previous 8-5 schedule. Again, in the view of BSB the contract is
4 controlling.

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6 Montana law requires public employers and labor organizations representing their
7 employees to bargain in good faith on issues of wages, hours, fringe benefits, and other
8 conditions of employment, 39-31-301(5) MCA. Failure to bargain collectively in good
9 faith is a violation of 39-31-401(5) MCA. The Montana Supreme Court has approved the
10 practice of the Board of Personnel Appeals of using federal court and National Labor
11 Relations Board (NLRB) precedent as guidance in interpreting Montana collective
12 bargaining laws. State ex rel. Board of Personnel Appeals v. District Court (1979), 183
13 Mont. 223, 598 P.2d 1117; City of Great Falls v. Young (Young III) (1984), 211 Mont.
14 13, 686 P.2d185.
15
16

17 There is a long standing precedent wherein both the NLRB and the Montana Board of
18 Personnel Appeals (BOPA) defer to the contract grievance procedure when the dispute
19 arises in the confines of a long and productive relationship and there are no claims of
20 enmity on the part of the employer towards the employees exercising their protected
21 rights; the employer expresses a willingness to defer to the grievance mechanism; and,
22 the roots of an unfair labor practice charge rest in contract interpretation. See, for
23 instance, ULP 43-81, William Converse v Anaconda Deer Lodge County and ULP 44-81
24 James Forsman v Anaconda Deer Lodge County, August 13, 1982, wherein the Board of
25 Personnel Appeals adopted National Labor Relations Board precedent set forth in Collyer
26 Insulated Wire, 192 NLRB 387, 77 LRRM 1931, deferring certain unfair labor practice
27 proceedings to an existing negotiated grievance/arbitration procedure.
28
29

30 Here there is every reason why deferral would make sense, but there simply is no "fit" in
31 doing so. In the instant case the Union has not filed a grievance under the collective
32 bargaining agreement. Rather, the Union elected to file an unfair labor practice charge.
33 Although the charge was not filed "immediately" it was filed within the six month limitation
34 of 39-31-404 MCA. The unfair labor practice charge was filed in a timely manner.
35
36

37 There is no apparent authority for BOPA to compel arbitration when there is no grievance
38 filed by a labor organization. Because there is no grievance pending there is no potential
39 for the BOPA and an arbitrator to issue possibly conflicting opinions, a primary reason for
40 deferral. Arguendo, even if BOPA were to direct that a grievance should be filed to resolve
41 this matter the employer has expressed no interest in waiving its right to raise timeliness
42 as a defense in arbitration, a clear bar to deferral by either BOPA or the NLRB. See for
43 instance Branch International Services, 327 NLRB 209, 164 LRRM 1342 (1998) and
44 Raymond International, 218 NLRB 202, 89 LRRM 1461 (1975). In view of all of the above
45 deferral is not appropriate. Thus, contrary to strong precedent involving bad faith
46 bargaining allegations alone and the strong deference to deferral, in this case the BOPA is
47 left to look to the collective bargaining agreement to see whether there is merit to the
48 Union charge.
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Article 11, Section 1 of the collective bargaining agreement provides in relevant part:

Section 1: A regular work day shall consist of eight (8) hours of work and shall include two fifteen (15) minutes rest breaks and forty (40) hours shall constitute a regular work week. A work week shall consist of five (5) days of work and two (2) consecutive days off in each seven day period.

Article 11, Section 3 provides:

With management approval, an employee may designate a flexible work schedule, provided that the total workweek does not exceed 40 hours. Changes in any Article of this agreement that may be affected by this designation shall be mutually agreed to by the Employer and the Federation prior to implementation of the schedule.

Article 11, Section 7 provides:

Section 7: The employer agrees to furnish each affected employee hereunder with a copy of all existing work rules thirty (30) days after the effective date of this contract and also agrees to furnish each employee with a copy of any changes within ten (10) days before they become effective. New employees shall be provided with a copy of the work rules at the time of hire. All modifications or additions to existing work rules shall not become effective until the Federation Representative/State Federation representative has been furnished with a copy of the proposed changes or additions. The Federation reserves the right to file a grievance over the utilization of any new work rule adopted.

Article 12, the grievance procedure provides for the grievance procedure between BSB and Local 4327. The procedure provides in Section 5 that:

Section 5: The parties agree that within fifteen (15) working days of the alleged infraction, the employee and/or the Federation Representative must discuss the matter with the immediate supervisor. However, if through informal discussion, an employee's grievance is not resolved, they may seek relief by the following steps below in the sequence shown:

The steps of the grievance procedure are then specified.

Article 12, Section 6 then provides:

Section 6: In the event that the time limits specified in the subsection above are not adhered to by either one of the parties, the grievance will be settled in favor of the party that is not in default of the time limits. The time limits may be waived upon mutual agreement of both parties.

The above in mind, BOPA is left with the question of whether or not BSB committed an unfair labor practice by unilaterally changing work schedules. It is fundamental that a

1 unilateral change in a mandatory subject of bargaining is an unfair labor practice. An
2 exception clearly exists if, in fact, the employer, was merely following the terms of an
3 existing bargaining agreement, as is argued by BSB.
4

5 As previously mentioned, BOPA is reluctant to interpret a collective bargaining
6 agreement, but here there is little or no choice given how this case has evolved.
7 Nothing in the collective bargaining agreement specifically addresses a change to and
8 from a 4/10 schedule or any schedule for that matter. If anything the contract
9 contemplates a 5-8 schedule as the norm. It then addresses changes in work rules,
10 which by their nature and placement in the contract, include changes in work schedules.
11 Then, as per the contract, any changes in work rules, and therefore schedules, must be
12 noticed to the Union, as BSB did on June 18, 2009. Under the contract the Union then
13 reserves the right to grieve the change. Here BSB followed the contract and gave
14 notice to the Union that there would be a change in schedule. BSB lived up to the terms
15 of the contract. The arguments of BSB are compelling in this regard. Further given that
16 the Union does not couch its complaint in specific allegations of, for instance, anti-union
17 animus, or failure to provide information to process a grievance etc. there is nothing for
18 BOPA to look to resolve other than whether or not the contract was followed. It was.
19 This was not a unilateral change by BSB, but rather was a change contemplated in the
20 contract and subject to its interpretation. There was no violation of the terms of the
21 collective bargaining agreement and thus no unilateral change. BSB did not bargain in
22 bad faith nor did it interfere with the rights of bargaining unit members, individually, or
23 collectively. There is insufficient evidence offered by the Union to sustain a finding of
24 probable merit.
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28 29 **III. Recommended Order**

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31 It is hereby recommended that Unfair Labor Practice Charge 16-2010 be dismissed.
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35 DATED this 2nd day of February 2010.
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38 BOARD OF PERSONNEL APPEALS
39
40

41 By: _____
42 John Andrew
43 Investigator
44
45

46 NOTICE

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48 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
49 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
50 may be appealed to the Board. The appeal must be in writing and must be made within

1 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
2 Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to
3 dismiss becomes a final order of the Board.
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11 CERTIFICATE OF MAILING
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13
14 I, _____, do hereby certify that a true and correct copy
15 of this document was mailed to the following on the _____ day of _____
16 2010, postage paid and addressed as follows:
17

18 DEBBIE ALT
19 LOCAL 4372
20 1901 LOWELL AVENUE
21 BUTTE MT 59701
22

23
24 JC WEINGARTNER
25 MEA MFT
26 1232 EAST 6TH AVE
27 HELENA MT 59601
28

29 LINDSEY IDE
30 BUTTE SILVER BOW GOVERNMENT
31 155 WEST GRANITE
32 BUTTE MT 59701
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